Supreme Court, U.S.
FILED

(1) (1)

02 1568 APR 25 2003

No. 02-___

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JENEE MARIE WATSON,

Petitioner,

v.

RICHARD W. PARKER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN KURTZ
Counsel of Record
HUBBARD & KURTZ, L.L.P.
1718 Walnut
Kansas City, MO 64108
(816) 467-1776

April 25, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

67 pp

QUESTIONS PRESENTED

1. Whether the Tenth Circuit was correct in applying the "mechanical" approach to re-opening a bankruptcy case rather than the "equitable" approach, thereby exacerbating the conflict among the circuits in favor of disregarding a debtor's intentional design, fraud, and/or improper motive.

2. Whether the Tenth Circuit was correct in holding, in conflict with decisions of the Third Circuit and this Court, that obligations which had not accrued under state law at the time of a bankruptcy filing are nevertheless discharged, so long as the conduct giving rise to the obligation occurred before the filing.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT SHOULD RESOLVE THE 4-3 SPLIT AMONG THE CIRCUITS IN FAVOR OF THE "EQUITABLE APPROACH" OVER THE "MECHANICAL APPROACH" TO REOPENING A BANKRUPTCY CASE SO THAT A DEBTOR'S INTENTIONAL DESIGN, FRAUD, AND/OR IMPROPER MOTIVE CAN BE CONSIDERED	7
A. Bankruptcy's Foundation Upon Principles of Equity	7
B. Equitable Approach v. Mechanical Approach	8
C. Clean Hands/Doing Equity	11
D. Laches	12
E. Equitable Estoppel (Parker's "Conscious Decision" Not to Discharge His Obligation to Jenee Watson)	14

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD RESOLVE THE TENTH CIRCUIT'S CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT AND SUPREME COURT PRECEDENT AS TO WHETHER OBLIGATIONS THAT HAD NOT ACCRUED UNDER STATE LAW AT THE TIME OF A BANKRUPTCY FILING ARE NEVERTHELESS DISCHARGED 16

A. Chronology 16

B. The Non-Discharge of Post-Petition Debts 18

C. "Accrual Theory" v. "Conduct Theory" 18

D. Accrual of Legal Malpractice Cause of Action 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Amtrak v. Morgan, 536 U.S. 101 (2002) 12

Beezley v. California Land Title Co. (*In re Beezley*), 994 F.2d 1433 (9th Cir. 1993) 9

Costello v. United States, 365 U.S. 265 (1961) 13

DePaolo v. United States (*In re DePaolo*), 45 F.3d 373 (10th Cir. 1995) 14

Faden v. Ins. Co. of North America (*In re Faden*), 96 F.3d 792 (5th Cir. 1996) 9

Franklin Sav. Ass'n v. Office of Thrift Supervision, 31 F.3d 1020 (10th Cir. 1994) 18

Gansert v. Corder, 26 Kan. App. 2d 151, 980 P. 2d 1032 (1999) 20, 21

Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988) 19

Hawkins v. Landmark Fin. Co., 727 F.2d 324 (4th Cir. 1984) 14

In re Carilli, 65 B.R. 280 (Bankr. E.D.N.Y. 1986) 12

In re Chabot, 992 F.2d 891 (9th Cir. 1993) 12

In re Jensen, 995 F.2d 925 (9th Cir. 1993) 19

In re McMeekin, 16 B.R. 805 (Bankr. D. Mass. 1982) 20

In re M. Frenville Co., Inc., 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 18, 20

In re National Gypsum, 139 B.R. 397 (N.D. Tex. 1992) 19

In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla. 1994) 19

TABLE OF AUTHORITIES – Continued

Page

In re Rosinski, 759 F.2d 539 (6th Cir. 1985) 10

In re Serafini, 30 B.R. 606 (Bankr. W.D. Pa. 1983) 14

In re Soult, 894 F.2d 815 (6th Cir. 1990) 10

In re Straight v. Straight, 143 F.3d 1387 (10th Cir. 1998) 7

In re Thomas, 12 B.R. 432 (Bankr. S.D. Iowa 1981) 20

In re Towns, 16 B.R. 949 (Bankr. N.D. Iowa 1982) 14

In re Yazzie, 24 B.R. 576 (Bankr. 9th Cir. 1982) 12

Judd v. Wolfe (In re Judd), 78 F.3d 110 (3d Cir. 1996) 9

Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994) 19

Matter of Baitcher, 781 F.2d 1529 (11th Cir. 1986) 10

Matter of Stark, 717 F.2d 322 (7th Cir. 1983) 10

Matter of Stone, 10 F.3d 285 (5th Cir. 1994) 9, 10

Matter of Wheeler, 137 F.3d 299 (5th Cir. 1998) 18

Pancake House, Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986) 21

Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945) 11

R&R Servs., Inc. v. Mo. Ark Towing Co., Inc., 36 Bankr. 126 (Bankr. E.D. Mo. 1983) 18

Rheinbolt v. Credit Thrift of Am., Inc., 24 B.R. 167 (Bankr. S.D. Ohio 1982) 12

Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964) 9, 10

Rupp v. Mark Graf, 95 F.3d 936 (10th Cir. 1996) 7

TABLE OF AUTHORITIES – Continued

Page

Samuel v. Baitcher (*In re Baitcher*), 781 F.2d 1529 (11th Cir. 1986) 9

Sheftelman v. Standard Metals Corp., 839 F.2d 1383 (10th Cir. 1987) 8

Stark v. St. Mary's Hospital (*In re Stark*), 717 F.2d 322 (7th Cir. 1983) 8

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 167 S.Ct. 237, 91 L.Ed. 162 (1946) 20

Waterman S.S. Corp. v. Aguilar (*In re Waterman S.S. Corp.*), 141 B.R. 552 (Bankr. S.D. N.Y. 1992) 19

Zirnhelt v. Madaj (*In re Madaj*), 149 F.3d 467 (6th Cir. 1998) 9

STATUTES

11 U.S.C. §362(a)(1) 18

11 U.S.C. §523(a)(3) 10

11 U.S.C. §350(b) 1

11 U.S.C. §727(b) 2, 18

OTHER AUTHORITIES

H.R. Rep. No. 95-595, at 338 (1997), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6294; S.Rep. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jenee Marie Watson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit Court of Appeals issued its opinion in this case on December 23, 2002. *In re Parker*, 313 F.3d 1267 (10th Cir. 2002). Other decisions below included all of the following:

- *Watson v. Parker (In re Parker)*, 264 B.R. 685 (10th Cir. BAP 2001)
- Order Reopening the Case and Declaring the Debt Owed Jenee Marie Watson Discharged (D.Kan., 10-5-2000, Case No. 96-42822-7)

The pertinent rulings are reprinted in Appendix A.

JURISDICTION

The Tenth Circuit's opinion was dated December 23, 2002. Thereafter, Petitioner's Motion for Rehearing was denied on January 28, 2003. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

RELEVANT STATUTORY PROVISIONS

11 U.S.C. §350(b) provides that "[a] case may be reopened in the court in which such case was closed to

administer assets, to accord relief to the debtor, or for other cause."

11 U.S.C. §727(b) provides that "a discharge ... discharges the debtor from all debts that arose before the order for relief under this chapter".

STATEMENT

Disbarred lawyer Richard Parker's malpractice caused Petitioner Jenee Watson to lose forever her claim against her former employer. Because Parker never had the defendant served, time limits expired, and Watson's case was dismissed. Although Parker confessed his malpractice to Watson, he did not tell her of his bankruptcy and did not list her as a creditor. When Watson sued, Parker stated under oath that he purposely omitted her malpractice claim from his bankruptcy: "I made the conscious decision that I knew I had screwed up this case and I elected not to list her as a creditor so that she would have full rights to come after me." Nevertheless, after thus causing her to rely upon that commitment, he reneged and moved to reopen his case so as to discharge her. Three courts below have upheld Parker's reversal of commitment. There are abundant legal, factual, and equitable reasons why this former attorney should not be allowed to disavow his commitment, reopen his case, and discharge his obligation to Ms. Watson.

Parker's bankruptcy petition was filed on November 26, 1996. Twenty-eight days later, he wrote to Petitioner, confessing his malpractice. Although Parker later moved to reinstate Petitioner's suit, his motion was denied. Petitioner's malpractice claim was a post-petition debt.

Parker never informed her of the dismissal until *after* the bankruptcy petition had been filed. Furthermore, the Motion to Reinstate was filed and denied *after* the bankruptcy petition was filed. Parker's bankruptcy discharge was granted on May 14, 1998 without any reference to Jenee Watson. When Petitioner filed her malpractice lawsuit, she still did not know anything about this bankruptcy. On June 26, 1999, Parker testified under oath that he intentionally omitted her name from his list of bankruptcy creditors so that she could pursue her claim against him.

Nevertheless, on March 6, 2000, Parker filed his Motion to Reopen Case in the United States Bankruptcy Court for the District of Kansas. The Bankruptcy Court's decision against Petitioner and in favor of Parker was entered on October 5, 2000. Thereafter, the Bankruptcy Appellate Panel of the Tenth Circuit entered an opinion, on July 13, 2001, affirming the Bankruptcy Court. The Tenth Circuit Court of Appeals affirmed on December 23, 2002. Petitioner's Motion for Rehearing was denied on January 28, 2003. She now seeks review on a writ of certiorari.

The following facts describe the background of this case, leading to Parker's Motion to Reopen Case and Petitioner's opposition thereto.

- ***Attorney-Client Relationship***.

  Petitioner retained Parker to represent her in a lawsuit. Parker was then a duly licensed Kansas attorney, holding himself out as a person competent to provide legal services.

  Petitioner had a fiduciary relationship with Parker and placed a special confidence in him. In equity and good conscience, he was bound to act

in good faith and with due regard for her best interests.

Parker breached his fiduciary duty to Petitioner by failing to use the proper skill and care and diligence.

- December 1, 1995: Parker did file a two-page complaint on behalf of Petitioner in the United States District Court for the District of Kansas against Continental Health Care Systems, Inc.

- ***Multiple-Charge Arrest.***

May 6, 1996: Parker was arrested for "DUI, possession of cocaine, resisting arrest, battery on a law enforcement officer, suspended driver's license, and a few other miscellaneous things." [App. 10]

- ***Order to Show Cause.***

May 7, 1996: The federal magistrate ordered Parker to "Show Cause" before May 24, 1996 why the case should not be dismissed for failure to serve the defendant within 120 days. Parker never responded. [App. 10]

- ***Complaint Dismissed.***

May 31, 1996: The court dismissed the Petitioner's lawsuit because of Parker's failures. [App. 10]

- ***Bankruptcy Petition Filed.***

November 26, 1996: Parker filed his bankruptcy petition, without listing Petitioner as a creditor. [App. 11]

- ***Additional Arrest.***

December 15, 1996: Parker was arrested on charges of battery and criminal trespass when he tried to enter his former girlfriend's private residence. A two-count criminal complaint was filed on December 16, 1996. [*In the Matter of Richard William Parker*, 267 Kan. 779, 985 P.2d 124 (1999)].

- ***Notification of Malpractice to Client – 28 Days After Bankruptcy Filing.***

December 24, 1996: Parker wrote to Watson:

"Somehow, I did not do my job properly, and the defendant was never served with process. . . . In the event that the judge does not reinstate the case, then you will have a claim against me for malpractice."

- ***Motion to Reinstate.***

January 23, 1997: Parker filed the Motion to Reinstate.

- ***Denial of Motion to Reinstate.***

June 18, 1997: United States District Judge VanBebber denied the Motion to Reinstate.

- ***Filing of Malpractice Lawsuit.***

July 8, 1998: Petitioner filed her malpractice lawsuit against Richard Parker.

- ***Parker's Commitment Under Oath Regarding Jenee Watson's "Full Rights to Come After Me."***

June 26, 1999: When questioned as to why Watson was not included within the bankruptcy proceeding, Parker said the following under oath:

"I made the conscious decision that I knew I had screwed up this case and I elected not to list her as a creditor so that she would have full rights to come after me."

- ***Motion to Reopen Case in the Bankruptcy Court.*** March 6, 2000: Parker filed this Motion and it was thereafter granted by the Bankruptcy Court. Then, the Bankruptcy Appellate Panel and the Tenth Circuit affirmed that ruling.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for two reasons. First, the Tenth Circuit's decision in this case allows a debtor in bankruptcy to purposefully omit creditors from his bankruptcy petition, yet still have those creditors' claims discharged. The decision conflicts not only with the equitable basis of bankruptcy, but also with three other circuits that have ruled on the issue. Second, the Tenth Circuit held that a debt is discharged in bankruptcy even if no cause of action has accrued under state law. This second holding conflicts with the Third Circuit, and with the decisions of this Court. Both of these questions are important and recurring questions of federal law, upon which the circuit courts of appeal are split.

I. THE COURT SHOULD RESOLVE THE 4-3 SPLIT AMONG THE CIRCUITS IN FAVOR OF THE "EQUITABLE APPROACH" OVER THE "MECHANICAL APPROACH" TO RE-OPENING A BANKRUPTCY CASE SO THAT A DEBTOR'S INTENTIONAL DESIGN, FRAUD, AND/OR IMPROPER MOTIVE CAN BE CONSIDERED.

The Tenth Circuit's opinion in this case ". . . agree[d] with the Third, Sixth, and Ninth Circuits that the debtor's intent in failing to schedule a debt is irrelevant to the bankruptcy court's decision to reopen." [App. 4] That conclusion conflicts with Fifth, Seventh and Eleventh Circuit opinions on the same question. Bankruptcy courts are courts of equity, and as such, the "equitable approach" to determining whether to reopen a bankruptcy case far better fits with the purposes and policy of bankruptcy. The Bankruptcy Appellate Panel and the Tenth Circuit therefore erred in concluding "that the more mechanical approach is 'better reasoned and more faithful to the language of the Bankruptcy Code.'" [App. 3]

A. Bankruptcy's Foundation Upon Principles of Equity.

Tenth Circuit bankruptcy analysis starts "from the premise that the law of bankruptcy is founded upon principles of equity." *In re Straight v. Straight*, 143 F.3d 1387, 1389 (10th Cir. 1998). Decisions are keyed to "fairness and equity." *Rupp v. Mark Graf*, 95 F.3d 936 (10th Cir. 1996).

Persons seeking benefits from bankruptcy courts are cautioned to recognize that "resort (to bankruptcy) is subject to the mantle of equity." *In re Straight v. Straight*,

supra at 1389. This is in line with the historic equitable principle that those seeking equity must do equity. Bankruptcy courts are indeed reminded to use their "equity powers" as well as their "general powers." *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386-87 (10th Cir. 1987) (citing Section 105 of the Code).

B. Equitable Approach v. Mechanical Approach.

The Tenth Circuit's opinion acknowledged that "[t]he circuits are split between applying equitable principles which include consideration of the debtor's intent, or a more mechanical analysis which does not." [App. 2] The "equitable approach" would allow consideration of Parker's startlingly inequitable conduct toward Petitioner. The "mechanical approach" declares that conduct to be irrelevant and unworthy of review. Courts using the equitable approach deny the motion to reopen if the omission was the result of intentional design, fraud, or improper motive. Under the mechanical approach, intent is not considered, and the debt is discharged by operation of law, even as to unscheduled debts and without regard to a motion to reopen. Although the Panel somehow managed to define the mechanical approach as one that is applied by "the majority of courts" [App. 17] the Tenth Circuit correctly acknowledged that split among the circuits was evenly balanced [App. 2-3]:

Equitable Approach

Stark v. St. Mary's Hospital (In re Stark), 717 F.2d 322 (7th Cir. 1983) (per curiam)

Faden v. Ins. Co. of North America (In re Faden), 96 F.3d 792, 797 (5th Cir. 1996)

Samuel v. Baitcher (In re Baitcher), 781 F.2d 1529, 1534 (11th Cir. 1986)

Mechanical Approach

Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467, 471 (6th Cir. 1998)

Judd v. Wolfe (In re Judd), 78 F.3d 110, 115 (3d Cir. 1996)

Beezley v. California Land Title Co. (In re Beezley), 994 F.2d 1433 (9th Cir. 1993) (per curiam)

The Tenth Circuit had never directly addressed this issue before this case.

Jenee Watson fervently urges that the equitable approach, not the mechanical approach, is better reasoned and more faithful to the principles of bankruptcy law. *Faden*, *supra* at headnote [19-28] et seq., clearly explains the equitable approach's proposition that out-of-time amendments to schedule creditors should be permitted "only if exceptional circumstances and equity so require." *Id.*, citing *Matter of Stone*, 10 F.3d 285, 289 (5th Cir. 1994).

> [20] Our decision in *Robinson v. Mann*, 339 F.2d 547 (5th Cir. 1964), is the touchstone for determining whether a debt is dischargeable under section 523 (a)(3). *Stone*, 10 F.3d at 290. *Robinson* identified three relevant factors in evaluating whether a debtor's failure to list a creditor properly will prevent discharge of the unscheduled debt: (1) the reasons the debtor failed to list

> the creditor; (2) the amount of disruption that would likely occur; and (3) the prejudice suffered by the listed creditors and the unlisted creditor in question. *Robinson*, 339 F.2d at 550.
>
> [21] Under *Robinson*'s first factor, "a court should not discharge a debt under section 523(a)(3) if the debtor's failure to schedule that debt was due to intentional design, fraud, or improper motive. If the failure is attributable solely to negligence or inadvertence, however, equity points toward discharge of the debt." *Stone*, 10 F.3d at 291 (citations omitted). "The burden is on the debtor . . . to demonstrate absence of fraud or intentional design." *Springer*, 127 B.R. at 708.
>
> . . .
>
> As our distinguished colleagues in the Sixth, Seventh, and Eleventh Circuits have determined, a court should not discharge a debt under section 523(a)(3) if the debtor's failure to schedule that debt was due to intentional design, fraud, or improper motive." *Stone*, 10 F.3d at 291 (citing *In re Soult*, 894 F.2d 815, 817 (6th Cir. 1990); *Matter of Baitcher*, 781 F.2d 1529, 1534 (11th Cir. 1986); *In re Rosinski*, 759 F.2d 539, 542 (6th Cir. 1985); *Matter of Stark*, 717 F.2d 322, 323-24 (7th Cir. 1983)). Thus, even absent prejudice, equitable action should not be taken in cases where the debtor's failure to properly schedule a creditor is a result of more than "mere negligence or inadvertence."

These principles have a stronger logical foundation and incorporate more fully the historic principles of bankruptcy law. This conflict needs to be resolved by the Supreme Court. What follows below is a summary of equitable issues that are rendered powerless and irrelevant by the

"mechanical approach." These equitable principles have everlasting value in bankruptcy, and should not be cast aside now. Because the Tenth Circuit relied upon and essentially incorporated "the reasons explained by the bankruptcy appellate panel," extensive reference is made herein to the BAP decision.

C. Clean Hands/Doing Equity.

The principle that "he who comes into equity must come with clean hands" has been well-established before this court. "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith." *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945).

Parker did not come to the court with clean hands. As he said in his deposition,

"I made the conscious decision that I knew I had screwed up this case and I elected not to list her as a creditor so that she would have full rights to come after me." [App. 11] Parker's original intention was not to discharge her claim. Nevertheless, four years later and after his convictions for battery, possession of cocaine, possession of drug paraphernalia, and obstruction of official duty [App. 10], Parker decided that he wanted to escape Petitioner's claim after all. It is impossible to assert that Parker comes to equity with clean hands, after failing

to inform Watson of his bankruptcy, omitting her from his list of creditors, committing that her claim should not be discharged, and then causing her claim to be discharged. Further, Parker's four-year delay in seeking any judicial relief from Watson's claim is itself enough to invoke equity against him. In addition, Petitioner justifiably relied on Parker's testimony in pursuing her malpractice case against him.

Under the mechanical approach adopted by the Tenth Circuit, however, Parker's gross inequitable conduct gets no examination. It is irrelevant to the analysis. It is only under the equitable approach that courts can examine the circumstances surrounding the failure to list a certain creditor for intentional design, fraud, or improper motive. The Tenth Circuit's ruling sanctions a bankruptcy petitioner's fraudulent and intentional conduct and denies any remedy to unknowing creditors.

D. Laches.

The doctrine of laches "bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." *Amtrak v. Morgan*, 536 U.S. 101 (2002). The equitable defense of laches applies such that debtors can be denied the reopening of their bankruptcy case if there is a finding of prejudice to the creditor. *See*, e.g., *In re Chabot,* 992 F.2d 891, 893 (9th Cir. 1993) (citing *In re Yazzie,* 24 B.R. 576, 577-78 (Bankr. 9th Cir. 1982); *In re Carilli*, 65 B.R. 280, 281 (Bankr. E.D.N.Y. 1986); *Rheinbolt v. Credit Thrift of Am., Inc.*, 24 B.R. 167, 170 (Bankr. S.D. Ohio 1982)).

The Bankruptcy Court hearing this case acknowledged on the record that, "laches may have something to

do with it", but never gave it any consideration whatsoever. Despite Watson's extensive briefing on laches, neither the Bankruptcy Court nor the Tenth Circuit analyzed or ruled upon the issue, presumably because equitable matters are irrelevant under the mechanical approach.

The Bankruptcy Appellate Panel did acknowledge the principle that a party who has suffered prejudice due to unreasonable delay should have the benefit of laches as a valid reason to deny motions to reopen. H.R. Rep. No. 95-595, at 338 (1997), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6294; S.Rep. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835 ("laches may constitute a bar to an action that has been delayed too long)." [App. 14] The Panel specifically cited *Costello v. United States*, 365 U.S. 265, 282 (1961) for its declaration of two necessary elements for the application of laches:

> "(1) lack of diligence by the party against whom the defense has asserted, and
>
> (2) prejudice to the party asserting the defense."

[App. 14-15]

There was neither a claim urged by Parker nor a finding made at any level of review that he had in any way been diligent in filing his motion to reopen the case on March 6, 2000, four years after his November 26, 1996 bankruptcy petition. He was anything but diligent.

The Panel's curt disposition of the laches argument was to rule that there was no prejudice to Watson. [App. 16] Watson was economically, personally, and emotionally prejudiced by reason of Parker's actions. The multiple years of malfeasance and misrepresentation by Parker

took a huge toll on Petitioner. Had Parker acted diligently in listing Watson originally or made a timely motion to discharge her, he would have avoided the malpractice lawsuit altogether, avoided its filing fee, avoided the deposition transcription fee, avoided the hiring of an expert witness, and avoided multiple court appearances. [App. 16] This was never analyzed at all by the Tenth Circuit as it ruled that the mechanical approach would render such analysis valueless.

The sort of ruling that is made impossible by the mechanical approach is exemplified by *Hawkins v. Landmark Fin. Co.*, 727 F.2d 324 (4th Cir. 1984). Therein, the Fourth Circuit (in accordance with Fifth, Seventh, and Eleventh Circuit principles) upheld a bankruptcy court's refusal to reopen a case because eight months had passed since it was closed and a creditor had incurred court costs and counsel fees in commencing foreclosure proceedings on its lien. *See* also *In re Serafini*, 30 B.R. 606, 608 (Bankr. W.D. Pa. 1983), *aff'd*, 41 B.R. 880 (W.D. Pa. 1984); cf. *In re Towns*, 16 B.R. 949, 954 (Bankr. N.D. Iowa 1982) (holding that once a debtor has commenced a replevin action against the debtor's property, the debtor may not move to avoid the lien). The Tenth Circuit's ruling herein would preclude any such analysis.

E. Equitable Estoppel (Parker's "Conscious Decision" Not to Discharge His Obligation to Jenee Watson).

The same conduct by Parker also calls for the doctrine of equitable estoppel. The Panel cited *DePaolo v. United States* (*In re DePaolo*), 45 F.3d 373, 377 (10th Cir. 1995) for the proposition that there is a four-part test for the application of equitable estoppel:

(1) The party to be estopped is aware of the facts.

(2) The party to be estopped intended its act or omission to be acted upon.

(3) The party asserting estoppel did not have knowledge of the facts.

(4) The party asserting estoppel reasonably relied on the conduct of the other party to his or her substantial injury.

[App. 14-15] The Panel's disposition of this claim was specific to the fourth prong only. Watson asserts that the first three prongs are met by the considerable evidence she submitted. As to the fourth prong, the Panel's succinct, but incorrect conclusion was, ". . . there is no evidence that Watson relied on the Debtor's conduct to her substantial injury or that she was prejudiced by the debtor's failure to list her." [App. 16] This conclusion was drawn in the same way and with all of the same reasoning as outlined immediately above with regard to the laches/no prejudice argument. Therefore, all of the same reasoning outlined above applies here. The Panel made the same factual, logical, and legal errors. Petitioner clearly was entitled to the benefit of equitable estoppel, particularly (1) where the Panel acknowledged that there is "evidence that the Debtor purposely left Watson off his bankruptcy schedules" [App. 16] and (2) where the Debtor testified under oath that it was not inadvertent, but rather his determination that she should "have full rights to come after me." However, in the end, such an equitable estoppel analysis cannot be done under the Tenth Circuit's newly adopted mechanical approach.

II. THIS COURT SHOULD RESOLVE THE TENTH CIRCUIT'S CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT AND SUPREME COURT PRECEDENT AS TO WHETHER OBLIGATIONS THAT HAD NOT ACCRUED UNDER STATE LAW AT THE TIME OF A BANKRUPTCY FILING ARE NEVERTHELESS DISCHARGED.

All of the following took place after Parker's bankruptcy petition was filed:

- Petitioner first discovered Parker's misfeasance.
- Parker continued his representation of her.
- The Motion to Reinstate was filed.
- The Motion to Reinstate was denied.
- Watson was damaged in that her case was finally declared at an end.

The following composite chronology is very important for understanding that Watson's claim of legal malpractice never accrued until after the November 26, 1996 bankruptcy petition was filed. Watson's debt is therefore a post-petition debt and cannot be discharged.

A. Chronology.

June 2, 1993	Jenee Watson had her ***first appointment*** with Richard Parker to discuss her March 22, 1993 termination from employment.
September 26, 1995	Mr. Parker wrote to Ms. Watson on this date, telling her that he did "believe that ***you have a very good cause of action***. I apologize to you if

	you feel that I have not paid attention to your case."
December 1, 1995	***Parker filed a Complaint*** in the United States District Court for the District of Kansas.
May 7, 1996	A ***Notice and Order to Show Cause*** directed that Parker explain by May 24, 1996 why service had not been made and why the action should not be dismissed.
May 31, 1996	The court's ***Order dismissed the cause*** for failure to show good cause why service had not been made.
November 26, 1996	Parker filed his ***bankruptcy petition*** in this case.
December 24, 1996	Mr. Parker writes to Ms. Watson, telling her that the case "was in fact dismissed in May of 1996 for failure to effectuate service upon the Defendant." Furthermore, he promised to "file immediately a ***Motion to Reinstate*** the case based upon my lack of diligence. Hopefully, the judge will reinstate the case as there has been no harm done to either party or prejudice to either party."
January 23, 1997	***Motion to Reinstate*** filed by Richard Parker.
June 18, 1997	The court ***denied the Motion to Reinstate.***
July 8, 1998	***Watson v. Parker lawsuit*** was filed on this date.

B. The Non-Discharge of Post-Petition Debts.

11 U.S.C. Section 727(b) provides that, ". . . a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . ." The key date is the date of filing. This provision is the one that directs that a post-petition debt is not discharged in bankruptcy. Although Parker himself was aware that Watson's claim had been dismissed, he never shared this information with her until sending his letter dated December 24, 1996.

Likewise, a stay under Section 362(a)(1) of the Bankruptcy Code is also limited to proceedings that involve claims that "arose before the commencement of the case." Claims arising post-petition are not subject to the automatic stay. *R&R Servs., Inc. v. Mo. Ark Towing Co., Inc.*, 36 Bankr. 126 (Bankr. E.D. Mo. 1983) (Barta, B.J.).

C. "Accrual Theory" v. "Conduct Theory."

The Tenth Circuit's opinion acknowledged that "[t]he circuits are divided" as to when a claim arises for purposes of discharge in bankruptcy. [App. 4] Under the "accrual theory," a claim arises when a cause of action accrues under state law, while under the "conduct theory," the claim arises when the conduct takes place. *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), was cited by the Bankruptcy Appellate Panel for the accrual theory and identified as "the minority view . . . heavily criticized by courts." [App. 23] In fact, both the Tenth and Fifth Circuits had specifically declined to rule on this issue. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994); *Matter of Wheeler*, 137 F.3d 299

(5th Cir. 1998). Furthermore, the very first case cited by the Panel, *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir. 1988) stops well short of heavy criticism. In fact, the *Grady* court specifically acknowledged "that the result obtained in *Frenville* is not irrational . . . ." *Id.* at 22.

It is also incorrect to indicate that there are only two theories. *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994) limited the conduct theory by indicating that a claim would arise at the time of a debtor's negligent conduct only if the claimant had some type of specific relationship with the debtor at that time. *Id.* at headnote [39]. *Waterman S.S. Corp. v. Aguilar (In re Waterman S.S. Corp.)*, 141 B.R. 552, 556 (Bankr. S.D. N.Y. 1992), vacated on other grounds, 157 B.R. 220, 222 (S.D.N.Y. 1993) concluded that although a "claim" arose in bankruptcy at the moment a claimant was exposed to asbestos, potential future claims of individuals who had not manifested any detectable signs of disease when notice of the bar date was given were not dischargeable in the reorganization proceedings. *See also*, *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993) (concluding that for a "claim" to arise under the code, not only must a pre-petition relationship between the claimant and the debtor exist but also the "claim" must have been within the "fair contemplation of the parties" at the time of the bankruptcy); *In re National Gypsum*, 139 B.R. 397, 409 (N.D. Tex. 1992) (requiring the pre-petition conduct of the debtor to be such that the parties could "fairly contemplate" a problem in the future). Finally, *In re Piper Aircraft Corp.*, 162 B.R. 619, 626-27 (Bankr. S.D. Fla. 1994) recognized the huge significance of the question at hand:

> "If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, . . . it must be obvious that

> enormous practice and perhaps constitutional problems would arise from recognition of such a claim."

Thus, the *Frenville* position is not so easily dismissed after all. Petitioner's claim is a post-petition claim. As such, it should not have been subject to discharge. *Frenville*, at headnote [20], itself cited this Court's precedent as well as other bankruptcy courts:

> "Thus, while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, 'is to be determined by reference to state law.' *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161, 67 S.Ct. 237, 239, 91 L.Ed. 162 (1946); see also *In re McMeekin*, 16 B.R. 805, 808 (Bankr. D. Mass. 1982); *In re Thomas*, 12 B.R. 432, 433 (Bankr. S.D. Iowa 1981)."

Vanston indeed so provides. Thus, this Court's precedent supports *Frenville*. The Tenth Circuit's opinion below is therefore at odds both with the Third Circuit in *Frenville* and this Court in *Vanston*.

D. Accrual of Legal Malpractice Cause of Action.

Gansert v. Corder, 26 Kan. App. 2d 151, 980 P.2d 1032 (1999) restated the basic theories used to determine when a cause of action accrues for an attorney malpractice case in the State of Kansas:

> "'Depending upon the facts and circumstances of each case, there are at least four theories which can apply to attorney malpractice in

> Kansas as to when the accrual of a cause of action occurs and the statute of limitations begins to run. These include:
>
> (1) The occurrence rule – the statute begins to run at the occurrence of the lawyer's negligent act or omission.
>
> (2) The damage rule – the client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage as a consequence of his lawyer's conduct.
>
> (3) The discovery rule – the statute does not begin to run until the client discovers, or reasonably should have discovered, the material facts essential to his cause of action against the attorney.
>
> (4) The continuous representation rule – the client's cause of action does not accrue until the attorney-client relationship is terminated' "

Id. at 26 Kan. App. 2d at 153, citing *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 87, 716 P.2d 575 (1986).

In this particular case, Watson never discovered her claim against Parker until after the bankruptcy petition was filed. Furthermore, she continued to be represented by him until well after the bankruptcy petition was filed. Parker also assured Petitioner that there had been "no harm" to her. It was only in June 1997 that Parker's Motion to Reinstate was denied and the matter was finalized. This was over five months after the filing of the bankruptcy petition by Parker.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN KURTZ
HUBBARD & KURTZ, L.L.P.
1718 Walnut
Kansas City, MO 64108
(816) 467-1776
April 25, 2003

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: RICHARD W. PARKER, Debtor.	
JENEE MARIE WATSON, Appellant, v. RICHARD W. PARKER, Appellee.	No. 01-3251

Appeal from the United States Bankruptcy Appellate Panel
(BAP No. KS-00-066)
(KS Bankruptcy Court No. 96-42822)

(Filed Dec. 23, 2002)

Submitted on the Briefs:

John Kurtz of Hubbard & Kurtz, L.L.P., Kansas City, Missouri, filed briefs for Appellant.

Richard W. Parker, Appellee, filed a brief pro se.

Before **SEYMOUR**, **ANDERSON** and **O'BRIEN**, Circuit Judges.

SEYMOUR, Circuit Judge.

The issue in this case is whether the bankruptcy court properly reopened a bankruptcy case to discharge a claim. The bankruptcy court permitted debtor Richard W. Parker to reopen his Chapter 7 case and amend his schedules to include a legal malpractice claim that Jenee Watson, a former client, held against him. Ms. Watson appeals the decision of the bankruptcy appellate panel affirming the bankruptcy court. She contends the debtor should have been precluded by various equitable principles from reopening his case. Alternatively, she maintains the claim is nondischargeable because it arose after the debtor's discharge and/or because her claim otherwise met the requirements of nondischargeability under the bankruptcy code. We affirm.

There are two issues of first impression in this case. Because we agree with the position and reasoning of the bankruptcy appellate panel's published decision on both of these matters, *see Watson v. Parker (In re Parker),* 264 B.R. 685 (10th Cir. BAP2001), we write only to make clear the position of the circuit on these two issues.

The first issue we address is whether a debtor's intent in failing to schedule a claim is relevant to a bankruptcy court's decision to reopen a case in which there are no assets and no bar date. The circuits are split between applying equitable principles which include consideration of the debtor's intent, or a more mechanical analysis which does not. *Compare Faden v. Ins. Co. of North America (In re Faden),* 96 F.3d 792, 797 (5th Cir. 1996); *Samuel v. Baitcher (In re Baitcher),* 781 F.2d 1529, 1534 (11th Cir. 1986); and *Stark v. St. Mary's Hospital (In re Stark),* 717 F.2d 322, 323-34 (7th Cir. 1983) (per curiam), *with Zirnhelt*

v. Madaj (In re Madaj), 149 F.3d 467, 471 (6th Cir. 1998); *Judd v. Wolfe (In re Judd),* 78 F.3d 110, 115-16 (3d Cir. 1996); and *Beezley v. Calif. Land Title Co. (In re Beezley),* 994 F.2d 1433 (9th Cir. 1993) (per curiam).

After reviewing the cases, we are persuaded that the more mechanical approach is "better reasoned and more faithful to the language of the Bankruptcy Code." *Parker,* 264 B.R. at 694. As the bankruptcy appellate panel explained:

> Pursuant to § 727(b), the Debtor receives a discharge from all debts that arose before the date of the order for relief under Chapter 7, regardless of whether a proof of claim based on any such debt or liability is filed, unless an exception in 523(a) applies. Under § 523(a)(3)(A), a claim will not be discharged if it was neither listed nor scheduled and the creditor did not have notice or actual knowledge of the case so that the creditor could timely file a claim. Here the bankruptcy court correctly found that § 523(a)(3)(A) does not apply because the Debtor's Chapter 7 case was a no asset case with no claims bar date set; therefore, Watson had suffered no prejudice because Watson will have an opportunity to file a claim if any assets are discovered. Because § 523(a)(3)(A) does not apply, unless Watson can establish that the claim was nondischargeable under one of the exceptions referenced in § 523(a)(3)(B), her Claim was discharged by operation of law under § 727(b). We conclude that equitable considerations do not impact the dischargeability of a debt under § 523(a)(3)(A), and therefore, it was unnecessary to reopen the Debtor's Chapter 7 case for the purpose of making that determination. However, we find that the bankruptcy court did not abuse its discretion when it reopened the

> Debtor's case because the court conducted the right analysis.

Id. at 694-95 (footnote omitted). For the reasons explained by the bankruptcy appellate panel, we agree with the Third, Sixth, and Ninth Circuits that the debtor's intent in failing to schedule a debt is irrelevant to the bankruptcy court's decision to reopen.

The second issue concerns determination of the date on which a claim arose for purposes of classifying it as a pre- or post-petition claim. The circuits are divided as to whether to use a conduct theory, which determines the date of a claim by the date of the conduct giving rise to the claim, or an accrual theory, which determines the date of a claim pursuant to the state law under which liability for the claim arose. *Compare Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir. 1988), *with Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co. Inc.)*, 744 F.2d 332 (3d Cir. 1984). We recognized this split of authority in *Franklin Savings Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994), but found it unnecessary to take a position.

We now adopt the conduct theory as the one more in tune with the plain language and the policy underlying the Bankruptcy Code.[1] *See Parker*, 264 B.R. at 696. We

---

[1] The bankruptcy appellate panel noted that the courts embracing a conduct theory are divided as to a basic conduct theory versus a "narrow conduct theory" (also called the "*Piper* test.") *See Parker*, 264 B.R. at 697 n. 12. The narrow conduct theory courts hold that a claim arises at the time of conduct only if the claimant had a specific relationship with the debtor at the time the conduct occurred. *See, e.g., Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft*

(Continued on following page)

note, first of all, the Fourth Circuit's remark that it "ha[s] found no court outside the Third Circuit which has followed the reasoning and holding of *Frenville.* All of the cases coming to our attention which have considered the issue have declined to follow *Frenville's* limiting definition of claim." *Grady,* 839 F.2d at 201. As the Fourth Circuit pointed out, "[i]n the case of a claim . . . the legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court." *Id.* at 202. Turning "to the pertinent parts of the statutes at hand," the court noted:

> Section 362(a)(1) provides for an automatic stay of, among other things, judicial action against the debtor ". . . to recover a claim against the debtor that arose before the commencement of the case under this title." Section 101(4)(A) defines a claim to be a "right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."

Id. at 202. With respect to contingent claims, the court stated:

> We do not believe that there must be a right to immediate payment of money in the case of a tort

---

Corp., 58 F.3d 1573 (11th Cir.1995); *Lemelle v. Universal Mfg. Corp.,* 18 F.3d 1268 (5th Cir.1994); *California Dep't of Health Servs. v. Jensen (In re Jensen),* 995 F.2d 925 (9th Cir.1993). As noted by the panel, because the relationship in the case before us would meet either test, we need not decide which version of the conduct theory to adopt.

> . . ., as present here, when the acts constituting the tort . . . have occurred prior to the filing of the petition, to constitute a claim under § 362(a)(1). It is at once apparent that there can be no right to the immediate payment of money on account of a claim, the existence of which depends upon a future uncertain event. But it is also apparent that Congress has created a contingent right to payment as it has the power to create a contingent tort or like claim within the protection of § 362(a)(1). We are of opinion that it has done so.

Id. at 203. Pursuant to this reasoning, we hold that the malpractice claim here arose on the date it allegedly occurred, which was prior to the filing of the debtor's petition.

We are also persuaded by the bankruptcy appellate panel's resolution of the other issues raised by Ms. Watson substantially for the reasons set forth in its thorough and well-reasoned opinion. We therefore **AFFIRM**.

PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE RICHARD W. PARKER, Debtor. JENEE MARIE WATSON, Appellant, v. RICHARD W. PARKER, Appellee.	BAP No. KS-00-066 Bankr. No. 96-42822 Chapter 7 OPINION (Filed July 13, 2001)

Appeal from the United States Bankruptcy Court for the District of Kansas

---

John Kurtz of Hubbard & Kurtz, L.L.P., Kansas City, Missouri, for Jenee Marie Watson, Appellant.

Richard W. Parker, pro se.

Before McFEELEY, Chief Judge, CLARK, and BOHANON, Bankruptcy Judges.

McFEELEY, Chief Judge.

Creditor, Jenee Watson ("Watson"), appeals an order of the United States Bankruptcy Court for the District of Kansas ("bankruptcy court") that permitted Richard W. Parker ("Debtor") to reopen his Chapter 7 case and amend

his schedules to include a legal malpractice claim Watson had against him ("Claim"). Watson argues that equitable doctrines should have prohibited the Debtor from reopening his Chapter 7 case. Alternatively, Watson contends that the Claim is nondischargeable as it arose post discharge. Finally, Watson argues that her Claim is nondischargeable under the provisions of 11 U.S.C. § 523(a)(2), (4), or (6).[1]

For the reasons stated below, we AFFIRM.

I. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. The bankruptcy court's judgment disposed of the adversary proceeding on the merits and is a final order subject to appeal under 28 U.S.C. § 158(a)(1). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). Watson timely filed her notice of appeal pursuant to Federal Rule of Bankruptcy Procedure 8002.[2] The parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Kansas. 28 U.S.C.

---

[1] Future references are to Title 11 of the United States Code unless otherwise noted.

[2] The Debtor argues that this appeal is not properly before us as Watson has not presented us with "a statement of the reasons why an appeal should be granted" pursuant to Federal Bankruptcy Rule 8003. Debtor has misread this rule. Such a statement is required only when an appellant makes a "motion for leave to appeal under 28 U.S.C. 158(a)" an interlocutory order. Fed. R. Bankr. P. 8003. This appeal is of a final order.

§ 158(c)(1); Fed. R. Bankr.P. 8001; 10th Cir. BAP L.R. 8001-1.

II. Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr.P. 8013; *Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1370 (10th Cir. 1996).

Whether a bankruptcy court properly reopened a bankruptcy case is reviewed under the abuse of discretion standard. *Nintendo Co., Ltd. v. Patten (In re Alpex Computer Corp.),* 71 F.3d 353, 356 (10th Cir. 1995). "A court abuses its discretion if it renders a decision that is 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" *Phillips USA, Inc., v. Allflex USA, Inc.,* 77 F.3d 354, 357 (10th Cir. 1996) (quoting *United States v. Robinson,* 39 F.3d 1115, 1116 (10th Cir. 1994)). Questions of statutory interpretation are reviewed de novo. *Dalton v. Internal Revenue Service,* 77 F.3d 1297, 1299 (10th Cir. 1996). When a bankruptcy court has made factual findings that a debt falls within a statutory exception to discharge and there is no dispute about the legal principles, we review the factual findings under the clearly erroneous standard. *Arkansas Aluminum Alloys, Inc. v. Joyner (In re Joyner),* 132 B.R. 436, 438-39 (D. Kan. 1991). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

III. Background

Watson hired Debtor, at that time a practicing attorney, to represent her. Around December 1, 1995, the Debtor filed a complaint on Watson's behalf in the United States District Court for the District of Kansas against Watson's former employer (hereinafter, "Federal Case"). On May 7, 1996, a federal magistrate issued a "Notice and Order to Show Cause" ("Show Cause Order") directing the Debtor to submit cause in a writing to the court before May 24, 1996, as to why the Federal Case should not be dismissed for failure to make service on the defendant within 120 days. The Debtor did not file a response to the Show Cause Order, and on May 31, 1996, the Federal Case was dismissed.

One day prior to the Show Cause Order, on May 6, 1996, the Debtor was arrested for DUI, possession of cocaine, resisting arrest, battery on a law enforcement officer, suspended driver's license, and other miscellaneous charges. On December 15, 1996, the Debtor was arrested on charges of battery and criminal trespass for his conduct in attempting to enter a private residence where a former girlfriend lived.[3]

---

[3] The Supreme Court of Kansas temporarily suspended Debtor's license for eighteen months, commencing July 9, 1998, for these offenses as well as for the negligent practice of law in four separate complaints. Watson's complaint was not included in those proceedings.

(Continued on following page)

On November 26, 1996, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The Debtor did not list Watson as a creditor. Debtor's case was administered as a "no asset" case, and on May 14, 1998, the Debtor received a discharge. Sometime later, the bankruptcy court closed Debtor's case.

Debtor admitted that he had committed malpractice in Watson's case in a letter dated December 24, 1996. On January 23, 1997, the Debtor filed a motion to reinstate the Federal Case,[4] and, in February, Watson terminated his employment.

Watson filed a malpractice lawsuit in state court against the Debtor on July 8, 1998. In the Debtor's Answer he asserted, as an affirmative defense, the discharge of Watson's Claim in bankruptcy. Subsequently, Watson deposed the Debtor on June 26, 1999. In his deposition testimony, the Debtor stated, "I made the conscious decision that I knew I had screwed up this case and I elected not to list her as a creditor so that she would have full rights to come after me." (Applt. Suppl. App. at 103). Following the Debtor's deposition, on September 22, 1999, Watson amended her lawsuit to include as defendants the attorneys she had retained after terminating the Debtor's services.

The Debtor filed a Motion to Reopen his Chapter 7 case on May 6, 2000, seeking to reopen the case to declare

---

The Debtor's arrests are not substantively part of the basis of Watson's appeal.

[4] On June 18, 1997, the federal court denied the Debtor's Motion to Reinstate.

Watson's Claim discharged. Watson opposed the reopening of the case in Suggestions of Jenee Marie Watson in Opposition to Debtor Richard W. Parker's Motion to Reopen Case, arguing that laches and equitable estoppel applied and that she would be unfairly prejudiced if the case were reopened. Watson also maintained that her Claim was not discharged in the Debtor's Chapter 7 case and that she was entitled to nondischargeable punitive damages.

On October 5, 2000, the bankruptcy court filed an "Order Reopening the Case and Declaring the Debt Owed Jenee Marie Watson Discharged" ("Order"). In findings of fact and conclusions of law made on the record at two hearings, the bankruptcy court concluded that the only reason to reopen the case was to determine the dischargeability of Watson's Claim. The bankruptcy court found that there were only two issues in this case that would render Watson's claim nondischargeable: 1) whether under § 523(a)(3)(A) Watson was prejudiced by the omission of her Claim from the Debtor's Chapter 7 schedules; 2) whether under § 523(a)(3)(B) the Debtor's malpractice was nondischargeable under §§ 523(a)(2), (4), or (6). The bankruptcy court held that neither of these sections applied.

Subsequently, the bankruptcy court's Order reopened the Debtor's Chapter 7 case and discharged Watson's Claim pursuant to § 727(b). The bankruptcy court granted Watson ten days from the entry of its Order to seek permission to present evidence that the claim was nondischargeable under § 523(a)(6) on the grounds that any malpractice the debtor committed was intentional or willful. Although Watson filed an untimely affidavit, which purported to offer such evidence, to which the Debtor filed

a response, Watson never formally sought permission from the bankruptcy court as directed. Subsequently, the bankruptcy court's Order became final on October 8, 2000. This appeal followed.

IV. Discussion

Watson argues that the court erred when it permitted the reopening of the Debtor's Chapter 7 case under § 350(b) of the Bankruptcy Code as the bankruptcy court did not consider the equitable doctrines of laches, estoppel, and clean hands, which, Watson contends, limit the statute. Pursuant to § 350(b): "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The statute gives the bankruptcy court broad discretion in deciding whether to reopen the case.

Bankruptcy Rule 5010 delineates the procedure for reopening a case. Fed. R. Bankr. P. 5010.[5] Only a debtor, creditor or trustee, has standing to move for the reopening of a case. *Alpex,* 71 F.3d at 356. Here, approximately two years after he received his discharge, the Debtor moved to reopen his Chapter 7 case to accord him relief from Watson's malpractice claim. Pursuant to Bankruptcy Rule

---

[5] Rule 5010 provides:

> A case may be reopened on motion of the debtor or other party in interest pursuant to a § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interest of creditors and the debtor or to insure efficient administration of the case.

Fed. R. Bankr. P. 5010.

9024 a motion to reopen a case is not subject to the one year limitation that governs other motions.[6] However, bankruptcy courts have found that when an unreasonable delay has prejudiced the party opposing reopening, laches is a valid reason to deny motions to reopen. H.R. Rep. No. 95-595, at 338 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6294; S. Rep. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835 ("Though the court may permit reopening of a case so that the trustee may exercise an avoiding power, laches may constitute a bar to an action that has been delayed too long.").

Watson contends that both laches and/or equitable estoppel should bar the reopening of this case, alleging that the Debtor's failure to include her on his schedules caused her economic harm because of the litigation expenses of her Claim.

Generally, courts will apply the doctrine of laches when the following two elements are met: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States,* 365 U.S. 265, 282 (1961). Courts employ equitable estoppel when all four prongs of the following test are met: 1) the party to be estopped is aware of the facts; 2) the party to be estopped intended its

---

[6] Rule 9024 provides:

> Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b). . . .

Fed. R. Bankr. P. 9024.

act or omission to be acted upon; 3) the party asserting estoppel did not have knowledge of the facts; and 4) the party asserting estoppel reasonably relied on the conduct of the other party to his or her substantial injury. *DePaolo v. United States (In re DePaolo),* 45 F.3d 373, 377 (10th Cir. 1995). The evidence, Watson argues, establishes that she has met all elements of either test. She relies on *Calder v. Job (In re Calder),* 907 F.2d 953 (10th Cir. 1990) (per curiam), to support her argument that the bankruptcy court erred when it reopened the Debtor's case.

In *Calder,* after filing a voluntary Chapter 7 case, a debtor proceeded through state court litigation to judgment with a creditor that he had omitted from his schedules. *Calder,* 907 F.2d at 954. Following judgment, the debtor claimed the protection of the automatic stay to defeat the judgment. The Tenth Circuit held that "equitable principles may, in some circumstances, be applicable to claimed violations of the stay." *Id.* at 956. Circumstances that trigger equitable considerations include those when "a creditor was without actual knowledge of a bankruptcy petition and the bankrupt's unreasonable behavior contributed to the creditor's plight." *Id.* The Court, thus, upheld the bankruptcy court's order allowing the creditor's proof of claim on the grounds that the Debtor "unreasonably delayed" informing the creditor of the automatic stay. *Id.*

The bankruptcy court found *Calder* distinguishable from this case because, unlike the creditor in *Calder,* Watson suffered no prejudice as required by laches or equitable estoppel. Because Watson's malpractice Claim is proceeding under a contingent fee contract against two separate defendants against whom only one recovery may be made, the bankruptcy court found that she has suffered

no financial harm. The bankruptcy court reasoned that she would have incurred the expense of the Debtor's deposition regardless of whether she proceeded only against her other attorneys or all, including the Debtor. Similarly, other litigation expenses would be the same whether she proceeded against all defendants, including the Debtor, or the other defendants alone.

These findings are supported by the record. While there is evidence that the Debtor purposefully left Watson off his bankruptcy schedules,[7] there is no evidence that Watson relied on the Debtor's conduct to her substantial injury or that she has been prejudiced by the Debtor's failure to list her. In fact, before Watson took the Debtor's deposition, the Debtor made her aware of his contention that the Claim had been discharged in bankruptcy by asserting it as an affirmative defense in his Answer to her Complaint.

Alternatively, Watson argues that the bankruptcy court erred when it reopened the case under § 350(b) because a debtor's intent is germane to a court's inquiry pursuant to the "clean hands doctrine." Under the equitable clean hands doctrine, a party will not be accorded relief when the unconscionable act of the one coming for relief "has immediate and necessary relation to the equity that [the party] seeks . . . ." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). Watson contends

---

[7] Later, in a hearing before the bankruptcy court on March 20, 2000, the Debtor refuted his deposition testimony, arguing that at the time he filed his schedules, he had not known that Watson's case had been dismissed, Watson had not yet filed a malpractice claim against him, and she had not terminated his services. (Applt. App. at 24).

that the Debtor's deposition testimony that he purposefully omitted Watson from his schedules so that Watson could sue the Debtor for malpractice in state court was the unconscionable act that should have triggered the clean hands doctrine.

Courts are split on the issue of whether a debtor's intent in failing to schedule a claim is relevant in a court's decision whether to reopen a case under § 350(b) in no asset Chapter 7 cases when no claims bar date has been set. Some courts consider intent under the equitable clean hands doctrine, while other courts, following a mechanical approach, find that equitable principles do not apply. *See In re Cruz,* 254 B.R. 801, 807-08 (Bankr. S.D.N.Y. 2000) (collecting cases).

Courts using the equitable approach in deciding whether to reopen a case under § 350(b) examine the circumstances surrounding the failure to list a certain creditor. These courts have found that motions to reopen should be granted unless the omission was the result of fraud or intention. *See, e.g., Stark v. St. Mary's Hospital (In re Stark),* 717 F.2d 322 (7th Cir. 1983) (per curiam); *Faden v. Ins. Co. of North America (In re Faden),* 96 F.3d 792, 797 (5th Cir. 1996); *Samuel v. Baitcher (In re Baitcher),* 781 F.2d 1529, 1534 (11th Cir. 1986). These courts often conclude that reopening the case will have an impact on the dischargeability of the debt. *See, e.g., Faden,* 96 F.3d at 797; *Baitcher,* 781 F.2d at 1534. Thus, the intent of the Debtor at the time of the omission is relevant to the inquiry.

In contrast, the majority of courts apply the mechanical approach. *Cruz,* 254 B.R. at 807. The Third, the Sixth, and the Ninth Circuits have held that pursuant to the

plain language of the Bankruptcy Code the debt is discharged by operation of law and that to reopen a bankruptcy case to schedule a previously unlisted debt in a no asset, no bar date case has no effect on the dischargeability of the debt. *See, e.g., Zirnhelt v. Madaj (In re Madaj),* 149 F.3d 467, 471 (6th Cir. 1998); *Judd v. Wolfe (In re Judd),* 78 F.3d 110, 115 (3d Cir. 1996); *Beezley v. California Land Title Co. (In re Beezley),* 994 F.2d 1433 (9th Cir. 1993) (per curiam). In this approach, intent is irrelevant.

The Tenth Circuit has not directly addressed this issue.[8]

Following *Madaj* and the majority approach, the bankruptcy court observed that the clean hands doctrine does not apply because the intent of the Debtor is irrelevant to any inquiry outside the exceptions given in

---

[8] In *Dawson v. Unruh, (In re Dawson),* 209 B.R. 246 (10th Cir. BAP 1997), we addressed whether a Chapter 7 debtor in a no asset case in which a claims bar date had been set could reopen the case to schedule an inadvertently omitted debt. We found that equitable considerations did not apply in that case because equitable considerations could not override the plain language of § 523(a)(3)(A), which states that a debt is nondischargeable if the creditor did not have notice so as to timely file a proof of claim. *Dawson,* 209 B.R. at 250. This case is distinguishable in that a notice of no dividend pursuant to 2002(e) was never given here, so there was no question as to the timeliness of the claim. *See Dawson,* 209 B.R. at 250 (finding that "[o]ur case is clearly distinguishable from cases in which a 'notice of no dividend' had been given."). More importantly, we did not directly address the question of whether equitable considerations apply in a court's consideration of whether to reopen a no asset, no claims bar date case and reschedule a debt when there are allegations that a debtor intentionally omitted a creditor. *Id.* (citing *Stark* for the proposition that "a debtor may reopen to add an omitted creditor where there is no evidence of fraud or intentional design. . . . ").

§ 523(a)(2), (4), and (6). Although the bankruptcy court had reopened the case, it observed that reopening the case was, in fact, unnecessary as explained in *Madaj* because the debt was dischargeable as it did not meet either of the exceptions delineated in § 523(a)(3)(A) or (B).

We agree. The mechanical approach is better reasoned and more faithful to the language of the Bankruptcy Code. Pursuant to § 727(b), the Debtor receives a discharge from all debts that arose before the date of the order for relief under Chapter 7, regardless of whether a proof of claim based on any such debt or liability is filed, unless an exception in 523(a) applies.[9] Under § 523(a)(3)(A),[10] a claim

---

[9] Section 727(b) provides:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C. § 727(b).

[10] Under this exception to discharge:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection,

(Continued on following page)

will not be discharged if it was neither listed nor scheduled and the creditor did not have notice or actual knowledge of the case so that the creditor could timely file a claim. Here the bankruptcy court correctly found that § 523(a)(3)(A) does not apply because the Debtor's Chapter 7 case was a no asset case with no claims bar date set; therefore, Watson had suffered no prejudice because Watson will have an opportunity to file a claim if any assets are discovered. Because § 523(a)(3)(A) does not apply, unless Watson can establish that the claim was nondischargeable under one of the exceptions referenced in § 523(a)(3)(B), her Claim was discharged by operation of law under § 727(b). We conclude that equitable considerations do not impact the dischargeability of a debt under § 523(a)(3)(A), and therefore, it was unnecessary to reopen the Debtor's Chapter 7 case for the purpose of making that determination. However, we find that the bankruptcy court did not abuse its discretion when it reopened the Debtor's case because the court conducted the right analysis.

Next, Watson contends that the bankruptcy court erred in concluding that her Claim was discharged, arguing that the Claim arose post-petition. This argument is based on a theory that a cause of action accrues at the same moment that the statute of limitations for bringing the suit begins to run.

> timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing. . . .

11 U.S.C. § 523(a)(3)(A).

Under Kansas law the statute of limitations for a cause of action for an attorney malpractice case begins to run under one of the following four circumstances:

> (1) The occurrence rule – the statute begins to run at the occurrence of the lawyer's negligent act or omission.
>
> (2) The damage rule – the client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage as a consequence of his lawyer's conduct.
>
> (3) The discovery rule – the statute does not begin to run until the client discovers, or reasonably should have discovered, the material facts essential to his cause of action against the attorney.
>
> (4) The continuous representation rule – the client's cause of action does not occur until the attorney-client relationship is terminated.

Gansert v. Corder, 980 P.2d 1032, 1034 (Kan. App. 1999) (quoting *Pancake House, Inc. v. Redmond,* 716 P.2d 575, 579 (Kan. 1986)). Watson claims that under prongs two through four she did not have a cause of action until after the bankruptcy petition was filed. She argues that not only was she not cognizant of any legal malpractice until after the Debtor filed his Chapter 7 case, but she also continued to be represented by him; therefore, no legal cause of action accrued under state law until post-petition. Because § 727(b) provides only for a debtor's discharge "from all debts that arose before the date of the order for relief under this chapter," she contends that the bankruptcy court erred when it discharged her Claim.

The bankruptcy court held that § 101 of the Bankruptcy Code controls the issue of when a claim arises and that the Claim arose when the malpractice actually occurred. The issue of when a claim arises has been the subject of much debate among the courts. There are two views. One line of cases asserts that a claim arises only when there is an accrued cause of action under state law ("accrual theory"). *See, e.g., In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984). Although this case is not cited by Watson, this appears to be the interpretation of § 101(5)(A) that she advocates.

In *Frenville,* an independent auditing firm employed an accounting firm, Avellina and Bienes ("A&B"), to prepare its financial statement. After the auditing firm filed a bankruptcy petition, several banks that had received its financial statement sued A&B on the ground that it had been negligently prepared. A&B moved for relief from the automatic stay so that it could bring in the auditing firm as a third party defendant for its indemnification. Focusing on the language "right to payment" in the Code definition of "claim," the court concluded that a "right to payment" must exist pre-petition before a claim can exist. Because the Bankruptcy Code does not define when a right to payment arises, the court turned to state law. It found that because A&B had no right pursuant to state law to seek indemnification before the banks filed suit, the claim arose post-petition and therefore was not barred by the automatic stay. Consequently, under the *Frenville* approach, a court must look to the state law

under which liability for the claim arose to determine if there is a pre-petition claim.

Frenville is the minority view and has been heavily criticized by courts.[11] The cases rejecting this theory maintain that Congress intended the word "claim" to be read more broadly. *See, e.g., Grady v. A.H. Robins Co., Inc.,* 839 F.2d 198 (4th Cir. 1988). These courts have held that a claim arises at the time of the debtor's conduct that gives rise to the claim ("conduct theory"). *Id.* at 202-03; *In re Black,* 70 B.R. 645 (Bankr. D. Utah 1986). In *Grady,* a claimant who had used the Dalkon Shield sought stay relief for herself and all other future claimants to prove that her claim did not arise until after the filing of the Dalkon Shield manufacturer's bankruptcy case and therefore was a post-petition claim not subject to the automatic stay. Although under state law, the claim arose upon discovery, which occurred after the bankruptcy filing, the Fourth Circuit found that under the broad definition of the word "claim" in § 101(5), the claim arose when the conduct occurred that gave rise to the alleged liability. Because the Dalkon Shields had been manufactured prior to the filing of the bankruptcy case, as a matter of federal bankruptcy law, the claim arose pre-petition and was stayed by § 362. Under this approach, the timing of the

---

[11] *See, e.g., In re Amfesco Industries, Inc.,* 81 B.R. 777, 782 n.3 (Bankr. E.D. N.Y. 1988) (observing that the Frenville court's "focus on the 'right to payment' as defined by applicable state law limits the definition of a claim to be a matured right to payment . . . and is therefore inapposite to the meaning of 'claim' intended by Congress. The question of whether a claim exists should ultimately be determined under federal bankruptcy law.").

debtor's conduct that gives rise to the cause of action determines whether the claim is pre or post-petition.

This issue has not been addressed by the Tenth Circuit. *See Franklin Sav. Ass'n v. Office of Thrift Supervision,* 31 F.3d 1020, 1022 (10th Cir. 1994) (declining to rule on the issue).

We adopt the conduct theory. Pursuant to the plain language of the Bankruptcy Code as well as the policy underlying the Code, Watson's Claim arose at the time the Debtor committed the conduct on which the Claim is based.

A court, when interpreting a statute, must first examine the statutory language. *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). While under the Bankruptcy Code, "property interests are created and defined through state law," *Butner v. United States,* 440 U.S. 48, 55 (1979), the terms "creditors" and "claim" are explicitly defined by federal law in the Bankruptcy Code. Under § 101, a creditor is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . ." 11 U.S.C. § 101(10)(A). Pursuant to § 101(5), a claim includes the following:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .

11 U.S.C. § 101(5)(A). In the Code's definition of the term "claim," the pivotal word, for our purposes, is the term "contingent." "If unambiguous statutory language is not defined, we give that language its common meaning,

provided that the result is not absurd or contrary to the legislative purpose." *Dalton*, 77 F.3d at 1299 (citing *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1564 (10th Cir. 1993)). As defined by Black's Law Dictionary, a contingent claim is "[o]ne which has not accrued and which is dependant on some future event that may never happen." *Black's Law Dictionary* 290 (5th ed.1979). Because the Bankruptcy Code expressly delineates the boundaries of the term claim, the issue of whether a claim is valid under state law is not the primary inquiry for a bankruptcy court when determining whether a claim against a debtor is a bankruptcy claim under the Code. The central issue for a bankruptcy court is whether a claim as defined by the Bankruptcy Code existed pre-petition. We find that pursuant to the plain language of the statute, a claim will exist if some pre-petition conduct has occurred that will give rise to liability.[12]

---

[12] Still another line of cases rejecting the accrual theory has narrowed the conduct theory ("narrow conduct test"). These courts have found that a claim arises at the time of the conduct upon which the debtor's liability is based only if the claimant had a specific relationship with the debtor at the time the conduct occurred. *In re Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla.), *aff'd sub nom. Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd*, 58 F.3d 1573 (11th Cir. 1995); *see also California Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 930-31 (9th Cir. 1993) (holding that a "claim" will arise under the Code only when there is a pre-petition relationship between the claimant and the debtor and adding the requirement that the "claim" be within the "fair contemplation of the parties" at the time of the bankruptcy); *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277-78 (5th Cir. 1994) (following *Piper* and *Jensen*). Because the attorney/client relationship between the two parties here would meet the criteria of either test, we do not reject this line of cases, nor will we speculate in this case on whether the conduct theory should be so narrowed.

Notably, the conduct approach is also consistent with the policy behind the Code. Legislative history indicates that Congress intended the broadest possible definition of the term "claim." As detailed in the Historical and Revision Notes, the definition of the word "claim," was meant to be:

> a significant departure from present law . . . . By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

S. Rep. No. 95-989, at 21-22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787; *see also Pennsylvania Dep't of Pub. Welfare v. Davenport,* 495 U.S. 552, 558 (1990) (finding that Congress intended to adopt the broadest available definition of the term "claim"). Previously, under § 63 of the Bankruptcy Act, the term "claim" was modified by "provability" in order "to limit the kinds of debts that were payable in a bankruptcy case." *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.),* 730 F.2d 367, 375 n.6 (5th Cir. 1984). However, as indicated above, the new, expansive definition of the word "claim" was meant to help the debtor achieve a "fresh start," the philosophy that animates the current Bankruptcy Code.

Here, Watson's Claim involves legal representation that occurred pre-petition. Regardless of when the Kansas statute of limitations began to run, Watson had a contingent claim against the Debtor at the moment the Debtor engaged in the conduct that formed the basis for malpractice liability. As established by the record, the malpractice

occurred in May 1996, when the Debtor failed to respond to the Show Cause Order, resulting in the dismissal of the Federal Case. At that time, at a minimum, Watson had a contingent pre-petition claim against Debtor. When in November 1996, the Debtor filed under Chapter 7 of the Bankruptcy Code, this Claim was a claim against the Debtor's bankruptcy estate.

Watson then argues that the bankruptcy court erred when it found the Claim discharged as the Claim was nondischargeable pursuant to § 523(a)(3)(B), which provides that a debt will be nondischargeable if the debt meets the following criteria:

> (3) [the debt was] neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –
>
> . . . .
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

11 U.S.C. § 523(a)(3)(B). If Watson's Claim was nondischargeable under § 523(a)(2), (4), or (6), then her Claim would be nondischargeable pursuant to § 523(a)(3)(B) as it is uncontested that she had no notice of the Debtor's Chapter 7 case in time to permit her to timely file a proof of claim and request a determination of dischargeability.

In order to prevail under this section, Watson bore the burden of proving that her Claim was nondischargeable under § 523(a) by a preponderance of the evidence. *See Grogan v. Garner,* 498 U.S. 279, 287-88 (1991).

First, Watson contends that an agreement to provide legal services is enough to meet the criteria of either § 523(a)(2) or (4). Watson bases this argument on the premise that a promise to supply legal services and a failure to do so resulting in malpractice is equivalent to false representation, false pretense, actual fraud, or defalcation.

Under § 523(a)(2), a debtor will not be discharged from any debt "for money, property, [or] services . . . to the extent obtained by – (A) false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). Under this section "false pretenses" or "representations" are representations knowingly and fraudulently made that give rise to the debt. *Driggs v. Black (In re Black),* 787 F.2d 503, 505 (10th Cir. 1986). The term "fraud" as used in § 523(a)(2)(A) means actual or positive fraud rather than fraud implied by law. *Id.* (finding that under § 523(a)(2)(A) the term "fraud" "includes only those frauds involving moral turpitude or intentional wrong, and does not extend to fraud implied in law which may arise in the absence of bad faith or immorality."); *see also Chevy Chase Bank FSB v. Kukuk (In re Kukuk),* 225 B.R. 778, 786-87 (10th Cir. BAP 1998).

The bankruptcy court found that there was no evidence of fraud under § 523(a)(2)(A) so as to render Watson's Claim nondischargeable. Watson alleges that the bankruptcy court erred on the ground that this case is like *Fowler Bros. v. Young (In re Young),* 91 F.3d 1367 (10th

Cir. 1996). Watson argues that a failure to keep a client informed about the progress of the case is tantamount to fraud.

In *Young,* an attorney had an unwritten financial agreement with a client whereby monies they owed each other for construction and legal services would be credited to or deducted from one another's account. Later, the attorney signed a promissory note evidencing debt to the client. The attorney did not advise the client to obtain outside counsel before entering into such an agreement, nor had the attorney disclosed any possible conflict of interest in such an exchange of services. Subsequently, the attorney filed for bankruptcy under Chapter 7. The Tenth Circuit found that the attorney/debtor's failure to disclose to the creditor the terms of their financial agreement in writing as well as potential conflicts of interest involved in their agreement as mandated by the New Mexico Rules of Professional Conduct were false representations within the meaning of § 523(a)(2)(A) and remanded the case to the bankruptcy court for findings as to whether the debtor's misrepresentations were made with the intent to deceive the creditor so as to render the debt nondischargeable under § 523(a)(2).

Here, Watson contends that this case is like *Young* because the Model Rules of Professional Conduct in Kansas impose the following duties on an attorney: to keep a client reasonably informed about a matter, to explain a matter to a client so that a client may make informed decisions, and to act with reasonable diligence and promptness in representing a client. Kan. Ct. R. 226, Kan.

R. Prof. Conduct 1.3, 1.4(a), (b).[13] The bankruptcy court found that *Young* was distinguishable on the ground that the finding in *Young* was that a failure to disclose was equivalent in that case to an intent to deceive. In contrast, in this case, there was no intent to deceive.

We agree. While the Debtor did not keep Watson informed about the status of the Federal Case, there was no evidence proffered showing that the Debtor made any false representations about its status with the intent to deceive Watson. Additionally, there was no evidence that the Debtor knowingly entered into an attorney/client relationship with Watson with the intent not to represent her to the best of his abilities. Rather, the evidence in the record indicates that the Debtor was negligent in his handling of the Federal Case.

Section 523(a)(4) provides that a Chapter 7 debtor is not discharged from any debt resulting from "fraud or defalcation while acting in a fiduciary capacity . . . ." 11 U.S.C. § 523(a)(4). As required by § 523(a)(4), the creditor must show the following: "1) the existence of a fiduciary relationship between the debtor and the objecting party,

---

[13] Kansas Rule of Professional Conduct 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Kan. Ct. R. 226, Kan. R. Prof. Conduct 1.3. Pursuant to Rule 1.4:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Kan. Ct. R. 226, Kan. R. Prof. Conduct 1.4.

and 2) a defalcation committed by the debtor in the course of that fiduciary relationship." *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie),* 216 B.R. 283, 286 (10th Cir. BAP 1997) (citing *Young,* 91 F.3d at 1371-72).

The existence of a fiduciary relationship is a threshold issue under § 523(a)(4). *Id.* The Tenth Circuit has narrowly construed the phrase "fiduciary capacity." *Young,* 91 F.3d at 1371-72. In cases where the debtor is an attorney and the creditor is a client, the Tenth Circuit requires more than a general attorney-client relationship to establish a fiduciary relationship under § 523(a)(4). *Id.* at 1372.[14] Such a fiduciary relationship will exist only where there is an express or technical trust. *Id.* at 1371. Although the question of fiduciary status is one of federal law, state law is important when determining whether a trust relationship exists. *Id.* A technical trust is a trust imposed by law that arises by statute. *Allen v. Romero (In re Romero),* 535 F.2d 618, 621 (10th Cir. 1976).

Watson bases the argument that her Claim is nondischargeable pursuant to § 523(a)(4) solely on the fact that she and the Debtor had an attorney/client relationship. This directly contradicts the Tenth Circuit's holding that there must be more to establish a fiduciary relationship under § 523(a)(4) than a general attorney/client relationship. To establish the necessary, fiduciary relationship under § 523(a)(4), it was incumbent on Watson to introduce some evidence of an express or technical trust.

---

[14] *But see Andy Warhol Found. for Visual Arts, Inc. v. Hayes (In re Hayes),* 183 F.3d 162, 170 (2d Cir. 1999) (holding "that the attorney-client relationship, without more, constitutes a fiduciary relationship within the meaning of Section 523(a)(4).").

The bankruptcy court found that there was no evidence of a fiduciary relationship between the Debtor and Watson so as to support Watson's argument that her Claim was nondischargeable pursuant to § 523(a)(4). This finding was not clearly erroneous.

Watson next argues that the debt was nondischargeable because it meets the provisions of § 523(a)(6), which states that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" will not be discharged. 11 U.S.C. § 523(a)(6). The attorney appears to present this argument strictly to preserve it as he acknowledges that *Kawaauhau v. Geiger,* 523 U.S. 57 (1998), is controlling.

In *Geiger* the Supreme Court held that § 523(a)(6) requires that a debtor intend to injure either a creditor or a creditor's property. The Court stated, "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Geiger,* 523 U.S. at 61. This narrow reading of "willful" is akin to the standard of deliberate injury necessary for an intentional tort. *Id.* at 61-62.

Here, the bankruptcy court gave Watson ten days after its ruling in which to seek permission to present evidence that the Debtor had the intent to injure Watson or her property. Watson never did so. There is no evidence in the record of this kind of intent.[15]

---

[15] Watson also claims that the court erred in discharging the claim because there are potential punitive damage claims against the Debtor. The bankruptcy court found that punitive damages will only be

(Continued on following page)

V. Conclusion

For the reasons set forth above, the bankruptcy court's Order is AFFIRMED.

---

assessed when there is an intentional tort. Because Watson never introduced any evidence to the bankruptcy court establishing an intentional tort under § 523(a)(2), (4), or (6), the issue of punitive damages is irrelevant.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

In re: **RICHARD W. PARKER,** **DEBTOR.**	**CASE NO. 96-42822-7** **CHAPTER 7**

ORDER REOPENING THE CASE AND DECLARING THE DEBT OWED JENEE MARIE WATSON DISCHARGED

This case was before the Court on September 28, 2000, for a hearing on the motion of the debtor, Richard W. Parker, to reopen the case and discharge the claim of Jenee Marie Watson. The debtor appeared *pro se* and Jenee Marie Watson appeared through counsel, John Kurtz of Hubbard & Kurtz, L.L.P.

After reviewing the pleadings and hearing argument from the parties, and based on the findings made of record, the Court concludes that the motion to reopen should be granted and that the debt owed to Jenee Marie Watson should be declared to have been discharged pursuant to 11 U.S.C.A. §727(b). Although Ms. Watson was not listed in the debtor's bankruptcy schedules as a creditor, she has suffered no prejudice that would make her legal malpractice claim against the debtor nondischargeable under §523(a)(3). This bankruptcy case was a no-asset case, so no claims bar date has ever been set. If any assets should be found in the future, a bar date will be set and claims can still be timely filed then. Even if Ms. Watson had received notice of the bankruptcy case in time to file a dischargeability complaint, her claim would not have been

excepted from discharge pursuant to §523(a)(2), (4), or (6). These two facts mean her claim is not made nondischargeable by §523(a)(3). She does not allege that any other provision of §523(a) applies to her claim.

Ms. Watson is granted ten days from September 28, 2000 to seek permission to present evidence to the Court that any malpractice the debtor committed was intentional or willful so that her claim might be excepted from discharge by §523(a)(6). Absent such a request, this Order will become final.

IT IS ORDERED that the case is reopened for this proceeding.

IT IS DECLARED that the debt owed to Jenee Marie Watson was discharged by the entry of the order granting the debtor a discharge.

IT IS FURTHER ORDERED that unless on or before October 8, 2000, Ms. Watson requests the opportunity to present additional evidence, this Order will become final on that date.

Dated at Topeka, Kansas, this 5 day of October, 2000.

/s/ James A. Pusateri
JAMES A. PUSATERI
CHIEF BANKRUPTCY
JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **ORDER REOPENING THE CASE AND DECLARING THE DEBT OWED JENEE MARIE WATSON DISCHARGED** was deposited in the United States mail, postage prepaid on this 5th day of October, 2000, to the following:

Richard Parker
2006 Prairie Circle
Olathe, Kansas 66202

John Kurtz
HUBBARD & KURTZ LLP
1718 Walnut
Kansas City, Missouri 64108

/s/ Monice K. Crawford
Monice K. Crawford,
Certified PLS
Judicial Assistant to:
THE HONORABLE
JAMES A. PUSATERI
CHIEF BANKRUPTCY
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: RICHARD W. PARKER, Debtor, JENEE MARIE WATSON, Appellant, v. RICHARD W. PARKER, Appellee.	No. 01-3251

ORDER

Filed January 28, 2003

Before **SEYMOUR**, **ANDERSON**, and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in

regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk